NO. 78-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, for and on behalf of its member, BOISE CASCADE CORPORATION, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Respondents*.

On Petition For A Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit.

RESPONSE TO BRIEF IN OPPOSITION.

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RESPONSE TO BRIEF IN OPPOSITION.

I. Contrary to the Government's Opposition, the *National Woodwork*[1] "All The Surrounding Circumstances" Test Requires Pre- and Post-Entry Union Conduct and the Economic Consequences of a Purported Work Preservation Clause To Be Considered In Order To Determine Whether § 8(e) of the Labor Act[2] Has Been Violated.

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[1] *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U.S. 612, 644 (1967) (herein referred to as "*National Woodwork*").

[2] National Labor Relations Act ("Act"), 29 U.S.C. §§ 158(e).

A. ***The "all the surrounding circumstances" test is misapplied where a purported work preservation clause is held valid on its face under § 8(e), notwithstanding separate NLRB decisions holding that the Union's pre-entry and post-entry conduct violated § 8(b)(4)(B).***

The Board's decision and the Government's opposition separate §§ 8(b)(4)(B) and 8(e) and assert that a purported work preservation clause which has no express secondary objective does not violate § 8(e), irrespective of the Union's and the Council's pre- and post-entry conduct, the economic consequences of the application of the clause, and § 8(e)'s proscription against implied agreements.[3]

The respondents' efforts to keep modular homes out of the local housing market has been the subject of three separate cases. Prior to the adoption of Article XXII (the purported work preservation clause), respondents exerted secondary pressure against a modular home dealer and its customers. In the *Bender* case,[4] the Board held that the labor organizations' alleged work preservation object did not insulate their illegal pressures to keep modular housing out of the Butte market, but suggested that the same secondary objectives might be achieved through the negotiation of a work preservation clause with local

[3] Section 8(e) states in part that

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express *or implied*, whereby such employer ceases or refrains or agrees to cease or refrain from . . . dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement . . . contained in such an agreement shall be to such extent unenforceable and void . . . ." (29 U.S.C., § 158(e)). (Emphasis added.)

[4] *Southwestern Building Trades Council of Montana, et al.* (John A. Bender), 188 NLRB 224 (1971) (hereafter referred to as "*Bender*").

contractors.[5] Shortly after the *Bender* decision was rendered, the respondents accepted the Board's suggestion to pursue a work preservation clause when the collective bargaining agreement was next reopened. A three-month strike to force the acceptance of Article XXII in the collective bargaining agreement ensued. (Pet. App. 37a and 104a).[6]

Immediately following the three-month strike over the inclusion of the work preservation clause, the contractors

[5] The Board in the *Bender* case suggested as follows in its decision:

> "This case involves the application of the secondary boycott provisions of the Act to a dispute in the construction industry, generated by automation and changes in technology."
>
> * * *
>
> "In order to preserve and protect for its members their traditional work, many of the construction unions have entered into written contracts with contractors which specify that the fabrication of component parts of houses and buildings will be limited in specified particulars and that it shall not constitute a violation of the collective-bargaining agreement for the unions to refuse to allow its members to handle such prebuilt products. *The decisions of the Board and courts do not challenge such written agreement where its exclusive purpose is preservation of work which local labor has traditionally performed. Such arrangements, the Supreme Court has held, are not interdicted by either Sections 8(b)(4) or 8(e) of the Act."* (188 NLRB at 231) (Emphasis added).

[6] The administrative law judge's analysis of the literal terms of the clause was specifically adopted by the Board (Pet. App. 15a at n. 5). Member Kennedy observed in his dissenting opinion in the instant action that

> "It is significant that Respondent Carpenters conceived Article XXII as a means of avoiding the Board's earlier decision (in the *Bender* case) that its actions against the performance of work on these modular houses were unlawful. Therefore, the Administrative Law Judge's analysis (based on the literal terms of the clause) is inadequate and should not be adopted." (Pet. App. 19a).

instituted the *Silver Bow* case[7] and charged that Article XXII violated § 8(e). The Board held that evidence regarding the strike and picketing to obtain Article XXII was insufficient to support a § 8(e) violation and dismissed the contractors' allegations on the ground that the express terms of Article XXII did not establish any secondary objectives. (Pet. App. 41a).[8]

The Board acknowledged that in its decision in the instant case, "The timing of the *Silver Bow* case, of course, prevented any consideration as to what effects, if any, later enforcement efforts would have, or any consideration of events which occurred subsequent to litigation." (Pet. App. 75a). In *Silver Bow*, there was clearly no occasion to consider the union's secondary pressures to enforce Article XXII, and the Board left such questions open for future litigation.[9] Contrary to the Governments' opposition *Silver Bow* was not in fact considered binding by the Board.

> "The General Counsel and the charging parties assert in this proceeding that *Silver Bow* does not preclude further consideration regarding the validity of Article XXII. I would agree that the decision does not make the matter *res judicata* or create collateral estoppel." (Pet. App. 75a).[10]

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[7] *United Brotherhood of Carpenters and Joiners of America, Local 112 AFL-CIO* (Silver Bow Employers Association), 200 NLRB 205 (1972) (hereinafter referred to as "*Silver Bow*").

[8] The Government's opposition incorrectly asserts that "given the evidence before it in *Silver Bow* . . . , the Board was warranted in finding [in the instant action] that Article XXII, when negotiated, was intended merely to preserve work . . . " (Brief in Opposition, p. 8); quite the contrary, the *Silver Bow* case was limited to the express terms of Article XXII and is therefore totally inapposite.

[9] See Order Denying Motions in *Silver Bow* which is set forth in the Appendix B which is attached to this Response. In footnote 3 of said Order the adjudication of the respondents' secondary pressures to enforce Article XXII is left open for future litigation. (See Pet. App. 2b.)

[10] Petitioner, Chamber, attempted to intervene and reopen the *Silver Bow* case in light of the issuance of the Complaint in the instant

(Footnote continued on following page.)

Moreover, as Member Kennedy correctly noted, post-entry conduct must be considered in examining the legality of the work preservation clause under § 8(e):

> "(*Silver Bow*) is not persuasive in view of the evidence of unlawful intent revealed by the subsequent enforcement efforts explicated on the record here. The Board has clearly held that the post-entry conduct does reveal initial secondary purpose for and entry into such an agreement." (Citations omitted) (Pet. App. 19a).

The third time the Board considered the legality of the carpenters' and trade council's boycott was the present action which was filed following respondents' commencement of secondary picketing and threats against manufacturers, dealers, subcontractors, and customers who were outside any bargaining relationship to enforce the clause against third party neutrals to preclude modular homes from the local housing market.

Since the economic advantages of construction of a modular home requires many, if not all, of the tasks enumerated in Section 3 of Article XXII to be performed at the factory, *viz:* the shingling of roofs; the installation of exterior siding and trim; and the installation of interior wallboards, paneling, trim, stairs, bannisters, doors, cabinets and shelving, etc. (Pet. App. 104a-105a); Article XXII is simply an implied agreement between the union and union contractors to refrain from doing any business with respect to modular homes.

The decision below found that the Union's enforcement of Article XXII violated § 8(b)(4)(B), but incorrectly held that

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(Footnote continued from preceding page.)

case but was unsuccessful. Notwithstanding the Board's subsequent Order in *Silver Bow* that the question of the respondent's subsequent enforcement of Article XXII might be the subject of future litigation (see note 9, *supra*), the Government now maintains that once a clause is found valid on its face, subsequent widespread boycott pressure found to violate 8(B)(4) cannot result in a reexamination of the initially limited opinion.

the clause did not similarly violate § 8(e), holding in effect that the "all surrounding circumstances" test was not applicable to § 8(e).

Notwithstanding that "all the surrounding circumstances" established § 8(b)(4)(B) violations in the *Bender* and instant cases, the Board held here it is

> "... not precluded from considering the validity of Article XXII *per se* distinguished from the manner of its enforcement ... " (Pet. App. 54a)

and erroneously limited the question of a § 8(e) violation to the literal terms of the clause. The Brief in Opposition admits that the express terms of Article XXII excluded modular housing from the market, but erroneously states on page 9 that

> "The fact that under some circumstances, " *'the* express terms *and the application of Article XXII'* " may have precluded " 'the introduction of modular housing in the Butte area' (Pet. 21), does not establish that the clause violated Section 8(e). (Brief in Opposition, p. 9) (Emphasis added).

The Board's failure to look beyond the express terms of the clause is in direct conflict with *National Woodwork, supra.*

B. The "all the surrounding circumstances" test applies with respect both to § 8(b)(4)(B) and § 8(e).

Sections 8(b)(4)(B) and 8(e) cannot be separated in relation to "all the surrounding circumstances." Although the Government acknowledges that *National Woodwork* requires an inquiry into "all the surrounding circumstances" to determine whether the agreement and its enforcement were calculated to achieve primary or secondary objectives (Brief in Opposition, p. 7), the Government's Brief compartmentalizes §§ 8(b)(4)(B) and 8(e), as well as each facet of the record.

The Government states:

> "To be sure, in some instances, the Union applied the agreement in an unlawful secondary manner, but that does not sap Article XXII of an (sic) possible lawful application." (Brief in Opposition, p. 10).

On the contrary, the uncontroverted evidence in the record establishes that the only possible application of Article XXII is secondary. As long as the clause stands, any customer in Butte who buys a modular home is prevented from obtaining the construction of a foundation, having the home "stitched" together, getting electrical, plumbing, and water hook-ups, etc. It is not necessary for the union to picket the homesite. As long as local construction firms and workers know of Article XXII's continued existence, no modular homes will be built. The contention that Article XXII does not violate § 8(e) because of some unexplained possibility of a lawful, nonsecondary application is empty speculation.

Moreover, the various facets of the circumstances in this case cannot be separated. In an effort to distract from Article XXII's secondary purpose, the Government disregards *National Woodwork's* "all surrounding circumstances" test and segregates the respondent's pre-Article XXII secondary pressures against modular home dealers and customers which the *Bender* case held was intended to keep modular housing out of the market; the respondents' attempt to circumvent the *Bender* decision by pressuring the contractors' association to agree to Article XXII; the subsequent enforcement of the insurmountable restrictions against third party neutrals; and the Board's holding in the instant case that such conduct violates § 8(b)(4)(B).

The lower court and the Government's Opposition disregard this Court's teachings in *National Woodwork* and *Pipefitters*[11] that the standard for determining whether a work

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[11] *NLRB* v. *Enterprise Association, et al.,* and *Pipefitters Local No. 638, et al.,* 429 U.S. 507 (1977) (referred to as either *"Enterprise"* or *"Pipefitters"*).

preservation clause violates §§ 8(b)(4)(B) and 8(e) are the same.[12]

The Board failed to address the cases cited by Member Kennedy in his dissent, where extrinsic evidence was considered with respect to § 8(e) violations. Likewise, the decision of the court below departs from its decision in *International Association of Machinists* (Marriott In-Flite Services), 197 NLRB 232 (1971), *aff'd.*, 491 F.2d 367, *cert. denied*, 419 U.S. 881 (1974), where it affirmed a Board decision which stated

> "[I]t would be illogical to find unlawful a strike . . . to force [an employer] to cease doing business with [another employer] under Section 8(b)(4)(B), while holding that a contract . . . designed to achieve the identical result [is] not proscribed by Section 8(e)." (197 NLRB at 237-238)

The work preservation clause in *National Woodwork, supra,* did not violate § 8(e) because of the existence of a bargaining relationship between the union and the entity against which the clause was enforced, and in *Pipefitters, supra,* because the validity of the clause under that section was not challenged (429 U.S. at 521 n.8). These cases do establish, however, that §§ 8(b)(4)(b) and 8(e) cannot be separated with regard to an analysis of the surrounding circumstances.

The Government opposition fails to respond why, consistent with principles of *National Woodwork* and *Pipefitters,* the "right to control" and "surrounding circumstances" tests should not be equally applicable to a violation of § 8(e).

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[12] In *Pipefitters* the court confirmed *in pari materia* treatment of §§ 8(b)(4)(B) and 8(e), as follows:

> [T]he scope of the prohibition is §§ 8(b)(4)(B) and 8(e) are essentially identical . . ." (429 U.S. at 521 n.8).

C. ***National labor policy proscribes union control through agreements creating geographical enclaves for local contractors.***

The Government's suggestion that the *Connell* decision,[13] is narrowly limited to "top down organizing" and labor's exemption from the antitrust laws ignores that the *Connell* case, *supra,* proscribed collective bargaining agreements which create geographical enclaves shielding local contractors from outside competition and held that such agreements violate § 8(e) of the Act.

In *Connell* the union entered into subcontracting agreements with local contractors which forbade subcontracts with non-union firms and thereby created a geographical enclave which protected local union contractors from outside competition. (421 U.S. at 624). In the instant action, the overbearing restrictions contained in Section 3 of Article XXII create the same type of geographical enclave which was analyzed in *Connell* to contravene national labor policy.

The Government's opposition also fails to address the clear conflict between the decision below and *Connell* which held that it is a violation of Section 8(e) for a labor organization to obtain or enforce restrictive agreements against persons outside a collective bargaining relationship and that §§ 8(b)(4)(B) and 8(e) must be read together.[14]

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[13] *Connell Construction Company, Inc.* v. *Plumbers Local 100,* 421 U.S. 616 (1975) (herein referred to as *"Connell"*).

[14] In *Connell* the Court stated that

> "(Section) 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment . . . . Section 8(e) was part of a legislative program designed to plug technical loopholes in § 8(b)(4)'s general prohibition of secondary activities. *In § 8(e) Congress broadly proscribed using contractual agreements to achieve the economic coercion prohibited by § 8(b)(4).* See *National Woodwork Mfrs. Assn., supra,* 386 U.S. at 634,87 S. Ct. at 1262. (414 U.S. at 628).

The Government's disregard of a § 8(e) remedy in favor of a limited § 8(b)(4)(B) remedy is clearly inconsistent with §8(e) and the mandate of the *Connell* decision. To limit the remedy to § 8(b)(4)(B) under these circumstances would require manufacturers and dealers as well as small non-union contractors and customers to file charges with the NLRB every time Article XXII has a secondary effect. Such a remedy is not reasonable or practicable and disregards the intendment of § 8(e) of the Act. The remedy for a § 8(e) violation is expungement of the clause.

II. The test whether Article XXII violated § 8(e) is not whether the respondents miscalculated or mistook the circumstances under which the clause could be enforced against third-party neutrals but rather the "foreseeable consequences" of precluding modular homes in the Butte area.

The Brief in Opposition erroneously states that *NLRB* v. *Operating Engineers Local No. 825* (Burns and Roe, Inc.), 400 U.S. 297 (1971)

> "...merely holds that where the union engages in 'flagrant secondary conduct'" (*id.* at 305), it is charged with foreseeing that its conduct would sufficiently disrupt business relationships to be unlawful under Section 8(b)(4)(B). (Brief in Opposition, p. 8).

On the contrary, in *Burns and Roe, supra,* the Court determined that the union's pressures had a secondary object on the basis that the "clear implication" and the "foreseeable consequence" of the union's demands were that the neutral was required either to force a change in the primary employers policy with respect to job assignments or to terminate its contract with the employer. The Court's reference to the

"flagrancy" of the union's secondary conduct was merely descriptive rather than determinative of the conduct in that case. (400 U.S. at 304-305).

In the instant case, the respondents must be charged with knowledge of the foreseeable consequences that the clause, if followed, would make it economically impossible to bring modular homes into the Butte market, and the consequences of the concommitant § 8(b)(4) activity with the actual loss, rather than preservation, of carpenters' jobs.

The lower court's reliance upon the self-supporting assertions of the union's business agent that the clause was intended to preserve work and resulted in a miscalculation of the circumstances under which the clause could be enforced (Pet. App. 9a) is clearly contrary to *Burns* and *Roe.* The Government's Opposition incorrectly defends the Board's and the lower court's utilization of the wrong test to determine the secondary nature of Article XXII. This case presents the Court with the opportunity to hold that the *Burns* v. *Roe* "forseeable consequences" test is equally applicable in determining a § 8(e) violation.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX B[15]

Butte, Mont.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED BROTHERHOOD OF CARPENTERS
& JOINERS OF AMERICA, LOCAL #112
AFL-CIO

and Cases 19-CC-497
19-CE-19

SILVER BOW EMPLOYERS' ASSOCIATION
AND BUTTE CONTRACTORS' ASSOCIATION

ORDER DENYING MOTIONS

On November 9, 1972, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] in which it adopted the findings, conclusions and recommendation of the Administrative Law Judge[2] as contained in his Decision of May 22, 1972, and dismissed the complaint in its entirety.

Thereafter, on June 4, 1973, the Chamber of Commerce of the United States of America filed a Motion to Intervene in this proceeding in order to file an attached Motion for Reconsideration and Memorandum in support thereof, jointly entered into by the Chamber of Commerce and the Charging Parties herein. The contention is made that evidence relevant to the instant proceeding, which was discovered since the Board's decision and will be presented in a pending unfair labor proceeding in *United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO Summit Valley Industries, Inc., et al.,* Cases 19-CC-588, 19-CC-591, 19-CC-604, 19-CC-

[15] Appendix A is attached to the Petition for Writ of Certiorari.

604-2, 19-CE-21, and 19-CD-212, warrants reconsideration of the Decision and Order. It is requested that the Board grant reconsideration but stay a decision thereon pending issuance of the Administrative Law Judge's Decision in the aforesaid unfair labor practice proceeding and thereafter consolidate the two proceedings for oral argument and *en banc* decision.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Chamber of Commerce's Motion to Intervene be, and it hereby is, denied as lacking merit.

IT IS FURTHER ORDERED that the Motion for Reconsideration be, and it hereby is, denied as it is lacking in merit and contains nothing not previously considered by the Board.[3]

IT IS FURTHER ORDERED that the request for oral argument be, and it hereby is, denied.

Dated, Washington, D.C., June 27, 1973.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

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[1] 200 NLRB No. 42.

[2] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

[3] To the extent that the Motion for Reconsideration is based on subsequent events giving rise to the filing of charges and the issuance of a consolidated complaint in *Summit Valley Industries, Inc.*, Cases 19-CC-588, et al., those events and the legal consequences flowing therefrom can be appropriately litigated in that proceeding and, if warranted, a suitable remedy will be provided.